THE 2000 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE LOCAL RULES FOR TEXAS FEDERAL DISTRICT COURTS

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I INTRODUCTION

The amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2000 make significant changes in discovery practice in federal court. This paper will provide a brief overview of those changes, and analyze how the four Texas district courts have dealt with the changes via amendments to their local rules.

II THE FEDERAL RULEMAKING PROCESS

Congress has delegated the statutory authority to prescribe rules of practice and procedure for the federal courts to the Supreme Court. *See* Rules Enabling Act, 28 U.S.C. § 2072(a); *Stern v. U.S. Dist. Court for Dist. of Mass.,* 214 F.3d 4, 13 (1st Cir. 2000). The procedure to amend the Federal Rules of Civil Procedure (FRCPs) begins with the Judicial Conference Advisory Committee, which drafts amendments and submits them to the Judicial Conference Committee on Rules of Practice and Procedure, known as the Standing Committee. The Judicial Conference's role in the rule-making process is defined by 28 U.S.C. §§331, 2073. Once the Judicial Conference approves the rules, it sends them to the Supreme Court. If the Supreme Court approves the proposed rules, it submits them to Congress by May 1 of the year in which they are to be effective. 28 U.S.C. §2074(a). Congress then has seven months to act on the proposed amendments; if it does nothing, the proposed amendments become effective on December 1 of the same year. *Id.*; *see Henderson v. U.S.*, 517 U.S. 654, 668, 116 S.Ct. 1638, 1646 (1996).

III THE 2000 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

At its meeting on April 19-20, 1999, the Civil Rules Advisory Committee (the "Committee") approved recommendations for the adoption of three rules packages. The first package, involving FRCP 4 and 12, regulates service on the United States and the time to answer when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of public duties. The second package, involving Admiralty Rules B, C, and E, along with conforming changes to FRCP 14, adjusts these rules to reflect the growing use of admiralty procedure in civil forfeiture proceedings and also the 1993 changes in FRCP 4. The third package amends FRCP 5, 26, 30, and 37 relating to discovery.[2]

A. Service on the United States: FRCP 4, 12

The first package, involving service on the United States, was initiated at the

suggestion of the Department of Justice to provide service on the United States and 60 days to answer a complaint against an individual sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. This change would make the practice essentially the same as when a United States officer is sued in an official capacity.

The proposed amendments to FRCP 4 and 12 are designed to do three things. Rule 4(i)(2) is amended to require service on the United States when a federal employee is sued in an individual capacity for acts done in connection with the performance of duties on behalf of the United States. FRCP 4(i)(3) is amended to ensure that an action is not dismissed for failure to serve all the persons required to be served under FRCP 4(i)(2). Finally, FRCP 12(a)(3) is amended to provide 60 days to answer in these individual-capacity actions, just as when a United States officer is sued in an official capacity.[3]

B. Admiralty Rules: Admiralty Rules B, C, and E & FRCP 14

According to the Committee, the proposals to amend the Admiralty Rules grew from the desire to adjust the rules to reflect the growing importance of civil forfeiture proceedings, since in rem admiralty procedure has long been employed for such proceedings. With the dramatic growth in land-based civil forfeiture proceedings, the need to adopt changes making some distinctions between maritime and forfeiture procedures became apparent. The process of considering these changes also led to a number of other proposed changes, including some designed to reflect the 1993 reorganization of FRCP 4.[4]

C. Discovery Rules: Rules 5, 26, 30 and 37.

1. Background - The Committee's Activity

The Civil Justice Reform Act of 1990[5] directed the Judicial Conference to examine discovery and initial disclosure issues as part of its response to Congress. In its final report to Congress on the Civil Justice Reform Act, the Conference called on the Committee to examine whether local variations of disclosure should continue, whether the scope of discovery should change, and whether specific time limits on discovery should be put into national rules. To address this issue, the Committee created a discovery subcommittee which first met in January 1997, and laid the groundwork for a major conference held at Boston College Law School in September 1997.

At the Boston College conference, the Committee received formal responses from academics, the American Bar Association Section of Litigation, the American College of Trial Lawyers, the Association of Trial Lawyers of America, the Defense Research Institute, Trial Lawyers for Public Justice, and the Product Liability Advisory Council. At the Committee's request, the Federal Judicial Center conducted a survey of attorneys across the country about discovery and prepared a comprehensive report of its findings[6]. The Committee also asked the RAND Institute for Civil Justice to reevaluate its database collected in connection with its work under the Civil Justice Reform Act for information on discovery practice, and prepare a report.[78]

The attorneys responding to the FJC survey indicated overwhelmingly — 83% — that they wanted changes made to the discovery rules. At the Boston conference in particular, the

Committee heard a nearly universal demand from the bar for national uniformity in discovery rules and a profound wish that the judiciary could be encouraged to engage in discovery issues earlier in each case and more completely. Both anecdotal and survey data seem to demonstrate that early judicial supervision of discovery reduces the cost of discovery and increases the parties' satisfaction with it. From the FJC study, the Committee also learned that some form of mandatory disclosure is used in a majority of districts. Even in "opt-out" districts, the courts or individual judges have often imposed some form of mandatory disclosure. The survey revealed that attorneys who have practiced disclosure are highly satisfied with it. Moreover, the Committee learned that an earlier expressed fear of satellite litigation with respect to disclosure was unfounded.

Drawing on the matters presented at the conference and the data generated by the Federal Judicial Center and the RAND Institute, the discovery subcommittee developed over 40 possible revisions to discovery rules for consideration by the Committee. The Committee narrowed this list and instructed the subcommittee to draft proposed amendments to implement specific proposals.

At its June 1998 meeting, the Committee authorized publication of the proposed discovery rule amendments. It then conducted three public hearings in December 1998 and January 1999, which generated over 300 comments and testimony from over 70 witnesses. On January 28, 1999, the Committee met again to discuss issues raised by the hearings, and eventually adopted the entire rules package with only minor amendments. The Judicial Conference of the United States approved the rules proposals, with the exception of that for FRCP 34 regarding explicit authority to impose cost-bearing conditions on discovery that exceeds the limits of Rule 26(b)(2). Neither the Supreme Court nor Congress took any action to modify or veto the rules, and as a result they took effect on December 1, 2000. The following is a brief description of the rule changes:

2. FRCP 5

This amendment forbids filing discovery materials unless they are used in the proceeding. According to the new committee note, the 1980 amendment to Rule 5(d) permitted courts to excuse filing of discovery materials by order. In 1989 the Judicial Conference Local Rules Project concluded that local rules prohibiting filing were inconsistent with Rule 5(d), and urged the committee to amend the rule. Eleven years later, it finally proposed such a rule, stating explicitly in the note that "it is designed to supersede and invalidate local rules."[9]

3. FRCP 26

The major changes to discovery practice are a result of Rule 26, and can be broken down into several subparts.

(A) Rule 26(a): Required Disclosures; Methods to Discover Additional Matters

The new rule makes several changes to the disclosure provision adopted in 1993. First of all, the initial disclosure obligation is narrowed, and the individual districts' ability to "opt out" by local rule is eliminated, although individual judges can decide otherwise by order in a particular case. In addition, eight specific categories of cases are exempted from the disclosure obligation. Parties are also permitted to object to the applicability of disclosure.

The amendments also provide for disclosure by added parties, and makes a slight change in the timing of initial disclosure.

The Committee made a minor modification in the wording of the disclosure obligation, changing it from requiring the disclosure of information "supporting its claims or defenses" to disclosure of information that the disclosing party "may use to support its claims or defenses."[10]

(B) Rule 26(b)(1): Discovery Scope and Limits: In General

The amendment limits attorney-controlled discovery to matters "relevant to the claim or defense of any party," but authorizes the court to order discovery "relevant to the subject matter involved in the action" on a showing of good cause.[11]

(C) Rule 26(b)(1): Discovery Scope and Limits: Limitations

The amendment removes local authority to modify the national limits on number of depositions or interrogatories by local rule, or to limit the maximum duration of depositions by local rule. The Committee also sought to include either here or in Rule 34 explicit authority to impose cost-bearing conditions on discovery that exceeds the limits of Rule 26(b)(2), but that provision was not adopted by the Judicial Conference.[12]

(D) Rule 26(d): Timing and Sequence of Discovery;
Rule 26(f): Conference of the Parties; Planning for Discovery

The amendments remove the ability of districts to exempt cases by local rule from the moratorium on discovery before the Rule 26(f) status conference, except for the eight categories of cases for which no disclosure is required. The amendment to Rule 26(f) removes the ability to opt out by local rule from the Rule 26(f) discovery conference requirements, again, except for the eight categories of cases. The requirement that such conferences be face-to-face is deleted. The timing of the conference is changed slightly to ensure that the court has the report prepared by the parties before it takes action under Rule 16(b).

Based on comments received, the Committee also recommended that courts that move very rapidly with initial case management conferences be permitted to adopt a local rule to shorten the period between the Rule 26(f) conference and the Rule 16(b) conference with the court, and shorten the time for submission of the report, or even eliminate the report requirement entirely.[13]

4. Rule 30

The amendment imposes a presumptive deposition time limit of "one day of seven hours" that cannot be modified by local rule.[14]

5. Rule 37

The amendment adds failure to amend a prior response to discovery as required by Rule 26(e)(2) as a circumstance warranting the sanction of Rule 37(c)(1) (refusal to permit use of material).[15]

IV LOCAL RULES CHANGES

The national rules changes have affected the four district courts in Texas to varying degrees, based largely on the extent to which they varied from the national rules by local rule prior to the 2000 amendments.

A. Southern District of Texas

In May, 2000, the Southern District renumbered its rules to correspond with the relevant federal rules, as required by Judicial Conference policy. The court also made minor changes to rules 7.6 (consolidation), 16.1 (setting the initial pretrial conference at within 140 days after the complaint is filed), and added a new 16.4 (opposition to referral to ADR). The court did not make any revisions explicitly as a result of the 2000 amendments, but few, if any, appear necessary, since the judges of the Southern District appear to rely less on local rules to regulate practice than the other districts.

B. Northern District of Texas

The Northern District's procedure for amendments to its local rules is set forth in Special Order No. 2-46 (4/14/98) which limits changes to one set of modifications per year, absent emergency, or new statutes or federal rules. The deadline for submitting proposals is November 1 of the preceding year, with proposed rules distributed for comment on April 1, comments received through June 1, formal adoption by July 1, and the rule changes to take effect on September 1.

The Northern District's 2000 civil local rule amendments were limited to revisions to LR 3.1, 81.1, and the addition of LR 7.4 and 81.2, all dealing with the requirement of a "certificate of interested persons," which reflects changes proposed at the national level in the form of a new FRCP 7.1 "Disclosure Statement." The Northern District judges dealt with the 2000 amendments to the federal rules by amending the local rules a second time at their meeting on October 27, 2000. The significant changes consist of the following:

LR 1.1 "Definitions" adds permitting entry on land as a permissible form of discovery.

LR 5.1 dealing with the filing of pleadings and motions is amended to remove the reference to discovery materials and add a reference to materials that the Court orders to be filed. More importantly, the provisions in LR 5.2 prohibiting the filing of discovery materials and deposition notices were eliminated as a result of the 2000 amendment to FRCP 5 which makes such a rule national. A wording change transforms discovery "disputes" to discovery "proceedings."

LR 16.1 "Exemptions from Pretrial Scheduling and Management" continues the previous practice of exempting by local rule certain categories of cases from the scheduling requirements of FRCP 16, but removes the exemption from the conference requirement of FRCP 26(f). The first remains permissible by local rule - the second does not.

LR 26.1 "Initial Disclosures Not Required" was eliminated to conform with the national rule.

C. Western District of Texas

The judges of the Western District appointed a Local Rules Advisory Committee in

December 1998 in anticipation of 2000 amendments to the federal rules. The committee's mandate was to evaluate what changes in the local rules the federal changes necessitated, examine the Alternative Dispute Resolution Act of 1998 for necessary local changes, and generally review all of the local rules to see if changes could be made which would improve civil practice in the Western District.[16]

The Committee met monthly from December 1998 through March, 2000, and proposed changes which were adopted by the judges of the Western District on May 9, 2000. The changes amended local rules CV-3, 5, 7, 16, 26, 30, 33, 36 and 88, deleted CV 32 and 37, and added CV-65. Appendices "A" "B" and "H" were modified, and Appendix "B-2" was deleted. Of particular interest in light of the 2000 amendments are the following:

CV-5 (b), which prohibited the filing of discovery materials, was eliminated to avoid duplicating the new FRCP 5.

CV-7 dealing with motion practice had a number of significant changes. Reply briefs limited to five pages, are permitted within eleven days of service of the response, but the court need not wait on a reply before ruling. Proposed orders are now required to accompany certain types of motions and responses. The certificate of conference requirement is expanded from discovery motions to all nondispositive motions.

CV-16 dealing with pretrial conferences was amended to eliminate the local list of categories of cases exempted from the scheduling order requirement in favor of the FRCP 26(a)(1)(E) list of types of cases exempted from mandatory disclosures, along with six other categories based on the prior local rule. The rule was also amended to eliminate the mandatory disclosure "opt-out" provisions. The Court also modified the procedure for submitting a proposed scheduling order, changing it from by the plaintiff thirty days after a defendant appears, to by the parties 60 days after a defendant appears. The parties are still required to follow the local form, attached as Exhibit "B" to the local rules. Another major change was to eliminate existing sections (d-f), which had required discovery to be completed in six months, and provided substitute provisions for expert disclosure, and optional expedited docket procedures. In their place, the court adopted three new subsections that (1) clarified calculation of discovery deadlines, (2) provided for certain pretrial disclosures to be made ten days before trial (which eliminated the need for CV-32, CV-36(b), and the pretrial order in Appendix B-2), and (3) adopted a trial exhibit numbering scheme.

CV-26 was amended by removing the discovery exhibit numbering system in favor of the trial exhibit system placed in CV-16(f), removing the procedure for claiming a privilege, and providing for authentication of documents produced in discovery.

CV-30 was amended to remove provisions dealing with custody of depositions and add extensive provisions regarding the making of objections during depositions.

CV-33 dealing with interrogatories was amended to remove provisions that conflicted with or duplicated the new federal rule or caselaw, added a section regarding signatures, and modified the court-approved interrogatories to reflect the adoption of disclosure under the national rules.

CV-37 was eliminated as duplicative of previous sections dealing with filing of discovery materials and certificate of conference requirements.

CV-65 requires that applications for temporary restraining orders or preliminary injunctions be made separately from the complaint.

CV-87, which provided a detailed procedure for arbitration, was eliminated. Provisions regarding all forms of ADR were included in substantial revisions to CV-88

Appendix "A" was modified by extending the time for the plaintiff to file his class action statement from thirty days after the filing of the complaint to thirty days after the defendant answers.

Appendix "B", the standard docket control order, was revised substantially to eliminate the "expedited docket" section, provide fifteen days for designation of rebuttal experts, provide a date for objections to an expert's testimony to be filed, set a page limit for dispositive motions, and eliminate the new pretrial order requirement in favor of the pretrial disclosures under CV-16(e).

D. Eastern District of Texas

The Eastern District has a Local Rules Advisory Committee consisting of twelve practicing attorneys appointed by the chief judge, as well as the U.S. Attorney and the Federal Public Defender, which meet periodically to propose changes for the court's consideration. On January 27, 2000, Chief Judge Richard Schell asked the committee to review the upcoming 2000 amendments and propose any needed changes. The committee met on June 30, elected a chair, and prepared a first draft of proposed changes with the assistance of court liaison U.S. District Judge T. John Ward. The amendments were further revised at a second meeting on July 27, and put in final form at a phone conference on September 20.

As is the local custom, the proposals were formally presented to the judges at their October 13, 2000 meeting by the committee chair, who explained the committee's rationale and answered any questions the judges had regarding the proposals. At that meeting the judges made additional changes, and adopted the new rules, effective December 1, 2000.[17]

Due to the nature of the Eastern District's previous local rules, which implemented far broader disclosure than the national rules, and imposed significant limits on attorney-conducted discovery, the changes to the Eastern District's rules were extensive. They consisted of the following substantive changes:

CV-1, which sets forth the scope of the rules, was revised to direct attorneys to the federal rules first, since discovery practice in the Eastern District had previously been governed almost exclusively by the local rules.

CV-5 regarding service and filing of pleadings was revised to eliminate the prohibition on the filing of discovery materials to comply with the new national rule. The rule continues to specifically mention notices of deposition, since attorneys frequently attempt to file these documents. The requirement that the certificate of service include the date and method of service was moved here as well.

CV-7, which deals with the form of motions, had several substantive changes. Most significant is deletion of the requirement that attachments be included in the local fifteen page limit for nondispositive motions. A requirement was also added that only the relevant pages, i.e. not the entire deposition, be attached to motions and responses. This provision was taken from existing local rule CV-56 dealing with summary judgment practice. To better enforce page limitation requirements, the references in the rule to separate briefs were eliminated to make clear that any briefing must be included within the motion or response. The time for responses was changed from ten to fifteen days, which, after the application of FRCP 6, has the practical effect of extending response times by one day, and simplifying calculations. Finally, the certificate of conference requirements were combined and moved to make them

more conspicuous.

CV-10 was reorganized to promote clarity, and to incorporate new language that requires each paper to be clearly captioned to identify each included pleading, motion or other paper. The certificate of service requirement was deleted as duplicative of FRCP 5(d).

CV-16, dealing with pretrial conferences was modified to accommodate the new FRCP 26. References to case tracking and disclosure were removed, and the date of the management conference was moved from 120 days after issues have been joined under prior practice to no later than 60 days after the first defendant appears. This move is necessary because of the requirement in FRCP 26 which bars discovery until the parties have conferred, and ties the requirement to confer to the scheduling conference. Under prior practice, the parties were to exchange disclosures and complete party depositions before the management conference, hence the later date. In order to get discovery started sooner under the new rules, the scheduling conference had to be moved up.

CV-26, the local rule previously setting forth the Eastern District's unique system of track assignments, mandatory disclosures, expert disclosure, and pretrial disclosures was deleted almost in its entirety as either conflicting with or duplicative of FRCP 26. Provisions which survived were (1) the "no excuses" provision making clear that a pending motion to dismiss, remand, or transfer does not excuse a party from responding to discovery, (2) two minor provisions regarding expert disclosure, and (3) the requirement that parties file notices with the court that the required disclosures have taken place.

Two other provisions unique to the Eastern District also survived, albeit in modified form, in a calculated attempt to minimize disputes over the new two-tier scope of discovery relevance in revised FRCP 26(b)(1). Section (e) providing definitions for what constitutes "relevant to the claim or defense" (it formerly served to define that which "bears significantly on the claims and defenses") was retained to help minimize disputes over whether a particular discovery request falls within the narrower default scope of discovery under revised FRCP 26. In the event that parties are not able to resolve a dispute over whether discovery is appropriate absent a broadening of the scope of discovery, litigants are expressly referred to the Eastern District's "Discovery Hotline" in section (f), which survives from the previous rule, for an immediate ruling by a judicial officer as to whether the requested discovery is within the relevant scope of discovery.

CV-30, the oral deposition rule, is amended to delete the local rule providing a six hour limitation on depositions as in conflict with new FRCP 30. The existing language regarding the grounds on which a witness may be instructed not to answer is deleted as duplicative (and incompletely so) of the language in FRCP 30, and the one-sentence bar on objections during depositions was replaced with five sentences taken verbatim from Tex. R. Civ. P. 199.5(e). In the local committee's opinion, as set forth in its comment to the Eastern District judges, the revised language provides an improved mechanism for discovery objections that effectively permits the parties to address form objections at the time of deposition, while still preventing counsel from unduly delaying the deposition through objections.

CV-34 includes the language from former CV-26 regarding the procedure for obtaining authorizations for medical and wage records.

CV-79, which deals with exhibits and other documents kept by the clerk's office, allows for the destruction of sealed exhibits under the same procedures as unsealed exhibits, and prohibits the submission of exhibits to the clerk's office as well as submission of trial exhibits in binders. A new section (d) incorporates language from an existing general order regarding

hazardous materials sent to the Court.

CV-81 is amended to require notices of removal to contain the name and address of the court from which the case is being removed.

CV-83 was amended to eliminate the local limit on contingency fees of one-third of the total award. With the elimination of mandatory early disclosure, the substantial cost savings that were intended to be realized by parties paying attorneys by the hour disappeared. With it went the rationale for similarly limiting contingency fees.

Local Rule AT-1 regarding the admission of attorneys to practice was amended to require that applicants, whether for general admission or for admission pro hac vice, certify that they have read Local Rule AT-3, the "Standards of Practice to be Observed by Attorneys," and the local rules of court, and that they will comply with them. AT-3, a new rule, is the familiar standard set forth in the *en banc* opinion in *Dondi Properties Corp. v. Commerce Savings and Loan Association*, 121 F.R.D. 284 (N.D. Tex. 1988), with one exception. Section (j) is amended by adding a second sentence, so that it reads "[i]f a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent. The Court is not bound to accept agreements of counsel to extend deadlines imposed by rule or court order." (Additional language underlined). The committee's rationale in proposing this change was that while counsel certainly should cooperate in scheduling, the *Dondi* rule appears to mandate consent to extensions in many situations where the judges of the Eastern District have previously expressed a clear preference for enforcing deadlines and trial settings, even where the parties have agreed to seek a continuance. According, it noted that its intent in proposing the additional language was "to make it clear that, although opposing counsel is encouraged to agree to requests for reasonable extensions of time, counsel should not be stipulating to undue extensions of time that foil the court's goal of delay reduction." Or as the undersigned committee chair put it, "stop us before we delay again."

Finally, the court modified Appendix D, the Joint Final Pretrial Order, to require the parties to certify that they have made full disclosure and complied with all relevant discovery limitations, not just those in the local rules. It also deletes as obsolete the certification that the contingency fees limitation has been complied with.

III. CONCLUSION

As a result of the December 1, 2000 changes to the federal rules of civil procedure, federal practice in 2001 should be significantly less "balkanized" than it was from 1993 through 2000 under the prior version of FRCP 26. Fortunately for federal court practitioners, virtually all of the local rules for federal courts in Texas that conflicted with or duplicated these significant national rule changes were eliminated by timely action by the districts.

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10/31/00

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2. Much of the analysis of the rule changes in this article is taken from the May 11, 1999 Report of the Advisory Committee on Civil Rules, which is available, along with the formal rule amendments, in House Document 106-228, which can be obtained online at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:hd228.106.pdf.

3. The redlined rules are located on pages 58-64 of House Document 106-228.

4. See pages 64-98 of House Document 106-228.

5. 28 U.S.C. §§ 471, et seq.

6. Willing,et al. *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L.Rev. 525 (1998).

7. Kakalik, et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C.L.Rev. 613 (1998).

8. Much of the material produced for this symposium was printed in a symposium issue of the Boston College Law Review. *See, e.g.,* McKenna & Wiggins*, Empirical Research on Civil Discovery,* 39 B.C.L.Rev. 785 (May 1998); Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C.L.Rev. 683 (May 1998).

9. See pages 106-109 of House Document 106-228.

10. See pages 110-124 of House Document 106-228.

11. See pages 124-129 of House Document 106-228.

12. See pages 129-131 of House Document 106-228.

13. See pages 132-137 of House Document 106-228.

14. See pages 138-146 of House Document 106-228.

15. See pages 146-148 of House Document 106-228.

16. The revisions can be found at www.txwd.uscourts.gov/Rules/rule-txwd.pdf.

17. The final revisions, along with the committee's comments, are available on the Eastern District's website at http://www.txed.uscourts.gov/localrules.html.